PhileoAllied Bank (M) Bhd v Saddhona Indran a/p Sevapragasam

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2–24–638 OF 1998
KAMALANATHAN RATNAM J
16 JUNE 1999

Land Law *— Charge — Order for sale — Notice of demand — Calculation of interest — Whether calculation of interest on monthly rest contravene charge — Calculation of interest contrary to terms of notice of demand — Whether amount to 'cause to the contrary' — Whether Form 16D which relied on notice of demand bad in law*

The defendant charged to the plaintiff two pieces of land in respect of an overdraft facility granted by the plaintiff to the borrower. The plaintiff filed and served the statutory Form 16D on the defendant for non-compliance with the notice of demand dated 27 March 1998 and 15 April 1998. The plaintiff then made an application for sale of the lands pursuant to s 256(3) of the National Land Code 1965. The 'cause to the contrary' raised by the defendant to challenge the plaintiff's application were: (i) there was no provision made for interest to be calculated at monthly rests whereas in the notice of demand dated 27 March 1998 the plaintiff had specifically stated that that it had calculated the interest on monthly rest; and (ii) paragraph 3 of the notice of demand dated 15 April 1998 stated that the 1% additional interest rate would run from the date of the letter. However, based on para 4 of the notice of demand, it would seem the plaintiff was now calculating interest from 9 April 1998. Therefore, the defendant argued that Form 16D as filed and served and which relied on the notice of demand dated 15 April 1998 was bad in law.

Held, dismissing the application:

(1) The annexure to the charge executed by the defendant must be read together with the letter of offer when the court was to look into the terms of the loan agreement. Clause 4 of the annexure stated that interest shall be at the end of each calendar month. Since the letter of offer was silent as to the mode of calculating interest, the court had to fall back on cl 4. This ground raised by the defence must perforce fail (see pp 493E, G, 494A–B).

(2) When the plaintiff exercised its discretion and informed the borrower and the defendant by virtue of para 3 of the said letter that it was intending to exercise its right to impose the 1% 'from the date of this letter' which was dated 15 April 1998, the plaintiff was wrong to have calculated the interest to run from 9 April 1998 as stated in para 4 of the said letter. The plaintiff having made a calculated choice of exercising its right to vary or levy could not

A williy-nilly in the same letter take a different stand. Either by default or by providential design, the plaintiff had failed to calculate the interest from 15 April 1998 as it said it would. Clearly therefore, having based its statutory demand by way of Form 16D on a notice of demand (letter dated 15 April 1998) that included interest that the plaintiff was not entitled to by choice, ie B from 9 April 1998 to 14 April 1998, the plaintiff's demand was bad in law (see p 496D–F).

[Bahasa Malaysia summary

C Defendan menggadai kepada plaintif dua bidang tanah berkenaan dengan suatu kemudahan overdraf yang diberikan oleh plaintif kepada peminjam. Plaintif memfailkan dan menyampaikan Borang statutori 16D kepada defendan kerana tidak mematuhi notis tuntutan bertarikh 27 Mac 1998 dan 15 April 1998. Plaintif kemudian membuat permohonan untuk penjualan tanah-tanah tersebut mengikut s 256(3) D Kanun Tanah Negara 1965. 'Sebab di sebaliknya' yang ditimbulkan oleh defendan untuk mencabar permohonan plaintif adalah: (i) tiada peruntukan yang dibuat untuk faedah dikira atas dasar bulanan sedangkan di dalam notis tuntutan bertarikh 27 Mac 1998, plaintif secara spesifik menyatakan bahawa ia telah mengira faedah atas dasar bulanan; dan (ii) perenggan 3 notis tuntutan bertarikh 15 April 1998 E menyatakan bahawa 1% kadar faedah tambahan akan bermula daripada tarikh surat tersebut. Tetapi, berdasarkan perenggan 4 notis tuntutan tersebut, adalah kelihatan bahawa plaintif kini mengira faedah daripada 9 April 1998. Maka demikian, defendan menghujahkan bahawa Borang 16D seperti mana yang difailkan dan F disampaikan dan yang bergantung kepada notis tuntutan bertarikh 15 April 1998 adalah defektif di bawah undang-undang.

Diputuskan, menolak permohonan:

(1) Lampiran kepada gadaian tersebut yang disempurnakan oleh G defendan mesti dibaca bersama dengan surat tawaran apabila mahkamah hendak melihat kepada terma-terma perjanjian pinjaman tersebut. Fasal 4 lampiran menyatakan bahawa faedah adalah seharusnya pada penghujung setiap bulan kalendar. Memandangkan surat tawaran tersebut adalah senyap tentang cara pengiraan faedah, mahkamah terpaksa bergantung kepada H fasal 4. Alasan ini yang ditimbulkan oleh pihak pembelaan mesti gagal (lihat ms 493E, G, 494A–B).

(2) Apabila plaintif menggunakan budi bicaranya dan memberitahu peminjam dan defendan melalui perenggan 3 surat tersebut bahawa ia berhasrat untuk melaksanakan haknya untuk I mengenakan 1% 'dari tarikh surat ini' yang bertarikh 15 April 1998, plaintif telah silap dalam mengira faedah tersebut untuk bermula dari 9 April 1998 seperti mana yang dinyatakan di dalam

perenggan 4 surat tersebut. Plaintif yang telah membuat pilihan terhitung untuk melaksanakan haknya untuk mengubah atau melevi tidak boleh mahu tidak mahu di dalam surat yang sama mengambil pendirian yang berlainan. Sama ada disebabkan kegagalan atau dengan sengaja, plaintif telah gagal mengira faedah daripada 15 April 1998 seperti mana ia mengatakan bahawa ia akan berbuat demikan. Adalah jelas dengan berdasarkan tuntutan statutorinya melalui Borang 16D atas suatu notis tuntutan (surat bertarikh 15 April 1998) yang mengambil kira faedah di mana plaintif adalah tidak berhak secara pilihan, iaitu dari 9 April 1998 hingga 14 April 1998, tuntutan plaintif adalah defektif di sisi undang-undang (lihat ms 496D–F).]

Notes

For cases on order for sale of charged land, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1660–1712.

Cases referred to

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (refd)

Legislation referred to

National Land Code 1965 s 256(3)

WM Chang (*Raja, Darryl & Loh*) for the plaintiff.
D Krishnan (*Annie Maria* with him) (*Ramamoorthy Ledchumiah & Co*) for defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

This is the plaintiff's application, inter alia, for sale by public auction, two pieces of land belonging to the defendant and charged to the plaintiff in respect of an overdraft facility ('OD') granted by the plaintiff to the borrower, one Indran s/o Saravanamuthu for RM16,884,000 by way of a letter of offer dated 18 June 1996 and accepted by the borrower by signing on the same letter of offer and on the same day. Subsequently the said sum was increased by RM5,200,000 to RM22,084,000. Three charges were created over the said two pieces of land. The first charge dated 10 July 1997 was for RM22,084,000 over title No 31810. The second charge dated 10 July 1997 was for RM16,884,000 over title No 15468 created before the increase of the OD limit.

The third charge was a second legal charge for RM5,200,000 being the increased sum created over title No 15468. By letter dated 4 December

A 1997 the plaintiff gave notice of variation of the interest rate. Two AR notices of demand dated 27 March 1998 and 15 April 1998 were sent to the borrower and to the defendant with the second letter including the demand for penalty interest. Again two AR notices of demand dated 27 March 1998 and 15 April 1998 were sent to the defendant with the second letter including the demand for the additional interest of 1% per annum. The AR B cards with acknowledgements were also exhibited. Subsequently the plaintiff filed and served the statutory Form 16D on the defendant. The ground stated therein was non-compliance with the notice of demand dated 27 March 1998 and 15 April 1998.

C *Findings of the court*

Monthly rests

The 'cause to the contrary' raised by the defendant in challenging this application for order for sale pursuant to s 256(3) of the National Land D Code 1965 ('the Code') was to refer to the letter of offer which stipulates that the interest rate was 1.5% per annum over the base lending rate ('BLR') which then was 8.9% per annum. It was pointed out to me that there was no provision made for interest to be calculated at *monthly rests* (emphasis provided) whereas in the notice of demand to the borrower dated 27 March 1998 the plaintiff had specifically stated that it had calculated the E interest on *monthly rests*.

I find this argument too simple for consideration. It must be patently clear that the annexure to the charge executed by the defendant must be read together with the letter of offer when the court is to look into the terms of the loan agreement. Clause 50 of the annexure reads as follows:

F

> Other Terms And Conditions
>
> The terms and conditions herein stated shall be in addition to and not in derogation of any specific agreement or arrangement with regard to each banking facility now or hereafter from time to time subsisting between the G Bank and the Chargor or any terms and conditions that may be specified in any letter(s) (including any letter(s) of offer) given by the Bank to the Chargor from time to time.

Clause 4 of the annexure states that interest shall be at the end of each calendar month. The said clause reads as follows:

H

> Capitalisation of interest
>
> Subject always to the provisions of the section next following the interest on any principal monies for the time being secured by this charge including capitalised interest shall at the end of each calendar month or such other periods as the Bank may stipulate be capitalised and added for all purposes to I the principal sum then owing and shall thenceforth bear interest at the relevant prescribed rate and/or at any increased rate and be secured and payable accordingly and all the covenants and conditions contained in or

> implied by this charge and all powers and remedies conferred by law or by this charge and all rules of law or equity in relation to the said principal sum and interest shall equally apply to such capitalised arrears of interest and to interest on such arrears.

It is obvious therefore that since the letter of offer is silent as to the mode of calculating interest, the court has to fall back on cl 4. This ground raised by the defence must perforce fail.

In fact I specifically asked both counsel to address me on the meaning to be ascribed to the words 'to be serviced at the end of each month' in relation to the interest rate as stated in the letter of offer, as distinguished from cl 4 of the annexure. It is therefore necessary to reproduce 'interest rate' as described in the letter of offer.

> Interest Rate: 1.50% per annum over our Bank's base lending rate ('BLR'), herein referred to as the 'Prescribed Rate'. Interest on the OD Facility is to be serviced at the end of each month. Interest is to be calculated on the amount utilised at the end of each day and debited to your account at the end of each month.
>
> Our Bank's BLR is currently 8.90% per annum.

Rate of interest

The next issue taken by the defendant relates to the rate of interest charged. Referring to para 3 of the notice of demand dated 15 April 1998 addressed to the borrower which reads:

> Take note that our client has decided to charge additional interest of 1% per annum on all sums outstanding from the date of this letter.

the defendant pointed out that the 1% interest would actually run from the date of that letter. Prior to the date of that letter the interest would be 3.5% above the BLR as stated in the earlier notice of demand to the borrower dated 27 March 1998. However, referring to para 4 of the plaintiff's notice of demand dated 15 April 1998 to the borrower, the defendant submitted that it would seem the plaintiff was now calculating interest from 9 April 1998. It is therefore pertinent to reproduce para 4 of the said letter which reads as follows:

> On our client's instructions and on their behalf, we hereby demand from you the sum of RM23,668,480.24 which is due and owing under the said overdraft facility as at 8 April 1998 and interest thereon chargeable as follows:
>
> 4.1 on sums owing up to the overdraft limit of RM22,084,000 at the rate of 3.5% per annum above our client's Base Lending Rate on monthly rests;
>
> 4.2 on sums owing in excess of the overdraft limit of RM22,084,000 at the rate of 4.5% per annum above our client's Base Lending Rate on monthly rests; calculated from 9 April 1998 until 14 April 1998. From 15 April 1998 to the date of full settlement interest will be charged on all outstanding sums at the rate of 4.5% per annum above our client's

Base Lending Rate on monthly rests which interest is also hereby demanded.

Therefore the defendant argued that Form 16D as filed and served and which relies on this notice of demand dated 15 April 1998 is bad in law. In *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 (FC) the Federal Court held that 'cause to the contrary' within s 256(3) of the Code might be established only in three categories of cases: (i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s 340 of the Code; (ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and (iii) when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity. If no cause to the contrary could be shown, the court would be obliged to make an order for sale. The defendant thus relied on category (ii) to contend cause to the contrary.

In answer to this Mr WM Chang for the plaintiff referred this court to cl 52 of the annexure. This clause reads as follows:

Commitment Fee

The Customer and the Chargor expressly agree and undertake to pay in addition to the interest payable, a commitment fee of one per centum (1%) per annum or at such other rate or rates as may be prescribed by the Bank from time to time on any portion of any overdraft facility unutilised by the Customer and such commitment fee shall be debited to the account of the Customer at the end of each calendar month or such other periods as the Bank may stipulate and be capitalised and added for all purposes to the principal sum then owing and shall thenceforth bear interest at the relevant Prescribed Rate and be secured and payable accordingly and all the covenants and conditions contained in or implied by these presents and all powers and remedies conferred by law or by these presents and all rules of law or equity in relation to the said principal sum and interest shall apply equally to the said commitment fee and to such capitalised arrears of the commitment fee and to interest on such arrears. Further for the purpose of ascertaining whether the limit of the principal intended to be hereby secured has been exceeded or not all accumulated and capitalised commitment fee shall be deemed to be interest and not principal sum.

I was also referred to cl 53 which reads as follows:

Additional Interest And Default Rate

53.1 Notwithstanding the provisions herein contained, in the event that the agreed limit on any banking facility stipulated by the Bank shall be exceeded the Bank shall have the absolute right at any time and may from time to time levy or impose an additional interest of one per centum (1%) per annum above the relevant Prescribed Rate or at such other rate as the Bank may at its sole and absolute discretion and from time to time prescribe on any such excess amount calculated on a daily basis with monthly rests.

53.2 In addition and without prejudice to the powers rights and remedies herein conferred, if the Customer and/or the Chargor shall default in

> the payment on due date of any money payable by the Customer and/or the Chargor from time to time due to the Bank the Customer and/or the Chargor shall pay to the Bank additional interest of one per centum (1%) per annum above the relevant Prescribed Rate or at such other rate as may be prescribed by the Bank from time to time calculated from the date of such default until the date of full payment of the amount thereof with monthly rests as well after as before any demand or judgment and irrespective of whether or not the banker customer relationship between the Bank and the Customer has ceased or been terminated.

All these clauses to my mind do not answer the issue raised by the defendant. Whilst cl 52 allows the plaintiff to charge a commitment fee of 1% per annum on any portion of any OD facility unutilised by the customer and whereas cl 53 allows the plaintiff to charge additional interest of 1% per annum on the excess amount when the borrower exceeds the borrowing limit and whereas both these clauses give the plaintiff the absolute discretion to vary or to levy such commitment fee or additional interest, it seems to me that when the plaintiff exercised its discretion and informed the borrower and the defendant by virtue of para 3 of the said letter that it was intending to exercise its right to impose the 1% 'from the date of this letter' which was dated 15 April 1998, to my mind the plaintiff was wrong to have calculated the interest to run from 9 April 1998 as stated in para 4 of the said letter.

The plaintiff having made a calculated choice of exercising its right to vary or to levy cannot willy-nilly in the same letter take a different stand. The submission of Mr WM Chang that the plaintiff was magnanimous in only charging 1% rather than the 2% based on cll 52 and 53, cannot detract from the fact that either by default or by providential design the plaintiff has failed to calculate the interest only from 15 April 1998, as it said it would. Clearly therefore having based its statutory demand by way of Form 16D on a notice of demand (letter dated 15 April 1998) that included interest that the plaintiff was not entitled to by choice, that is, from 9 April 1998 to 14 April 1998, the plaintiff's demand was bad in law. The plaintiff's application is therefore dismissed with costs.

Application dismissed.

Reported by Jafisah Jaafar